STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY EDWARDS, Plaintiff-Appellee,	UNPUBLISHED August 30, 2007
v	No. 274315 Macomb Circuit Court Family Division
MUINGO E. MUTHUI-EDWARDS, Defendant-Appellant.	LC No. 2005-002850-DM

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order that continued joint legal custody but transferred physical custody of the minor child to plaintiff. Defendant also takes issues with additional orders issued by the trial court.[1] We affirm.

Defendant first asserts that the trial court erroneously issued a criminal bench warrant and that she was therefore erroneously arrested on a "criminal fugitive" warrant.[2] However, defendant fails to identify anything to support this assertion, and the bench warrant is devoid of any such characterization. It merely states that defendant "failed to appear before this court, as ordered, to show cause why s/he should not be held in contempt." Criminal contempt seeks to punish the contemnor for past conduct, whereas the goal of civil contempt is to coerce the contemnor to comply with an order. *In re Contempt of Dougherty*, 429 Mich 81, 91; 413 NW2d

[1] To the extent that defendant did not actually have an appeal of right with respect to some of the issues she raises on appeal, we exercise our discretion to "accept the pleadings as an application for leave to appeal, and resolve the appealed issue[s] on the merits." *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998).

[2] We initially note that because defendant did not raise issues in the trial court regarding the validity of the contempt order and bench warrant, the notice of the show cause order, or the applicability of the "federal UCCJEA," these issues are unpreserved, *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004), and will only be reviewed for plain error, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

392 (1987); *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 713; 624 NW2d 443 (2000). MCL 600.1701(g) and MCL 600.6075(1) authorize arrest and imprisonment for contempt of court for failure to obey a court order, and this Court has held that a trial court has the authority to hold an individual in contempt for violating a parenting time schedule. *Casbergue v Casbergue*, 124 Mich App 491, 494-495; 335 NW2d 16 (1983).

Incarceration for the failure to perform an act that is within a party's power is the classic case of civil contempt that authorizes the use of a coercive sanction. *Dougherty*, *supra* at 91-92. Further, a party must currently be in violation of the trial court's order for a coercive remedy to be imposed. *Id.* at 99. In the instant case, providing the child for plaintiff's parenting time was an act that was within defendant's power. Moreover, it is apparent that defendant was afforded the opportunity to purge herself of the contempt by complying with the order, which is another indicator that the contempt was civil in nature. See *Casbergue*, *supra* at 495-496. We conclude that the contempt at issue was civil in nature, especially when it is noted that plaintiff did not receive access to the child until defendant was arrested. Defendant's appellate argument is without merit, and, at any rate, she has already served her time in jail and has been released. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003) (addressing mootness).

Defendant next challenges the notice she received of the show cause hearing. The trial court's show cause order provided that "[a] copy of this Order and the Petition must be served upon Defendant and/or her attorney . . . not later than April 10, 2006[.]" Personal service was not required because the order provided for service upon defendant's attorney. See MCL 600.1968(4) and MCR 2.107(B)(1)(b). Defendant or her attorney received the show cause order within three days of its issuance, as evidenced by the fact that defendant responded on April 13, 2006. Nevertheless, defendant asserts that plaintiff's service of the motion to show cause was not timely filed pursuant to MCR 2.119(C)(1). However, MCR 2.119(C)(1) provides that the time limits specified in the rule do not apply to motions that may be heard ex parte. Because a motion to show cause may be heard ex parte, the notice provisions of MCR 2.119(C)(1) do not apply.

MCR 2.108(D) provides that a show cause order must set the time for service of the order and for the hearing. The show cause order provided that service must occur by April 10, 2006, which is what is reflected in the service of process contained in the lower court file. MCR 3.606(A), which governs contempt that occurs outside the immediate presence of the court, provides that the court shall order the alleged contemnor to show cause at a "reasonable time specified in the order[.]" Given that the order was mailed seven days before the hearing, and given that defendant responded four days before the hearing, the service of the order was reasonable and therefore timely.

Defendant additionally claims that the trial court disregarded MCR 2.612 and MCR 2.614(A)(1) when it issued the bench warrant four days after the show cause hearing, instead of waiting 21 days after the show cause order was issued. MCR 2.612 governs relief from judgment, it contains no reference to bench warrants or a 21-day period, and defendant fails to explain how it applied to the bench warrant. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100

(1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). The failure of defendant to properly address the merits of her assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

MCR 2.614(A)(1) provides that a judgment may not be executed until 21 days after its entry. However, a bench warrant is not a "judgment," and thus the automatic stay provision does not apply. As stated above, trial courts have the power to imprison one who is guilty of contempt of court for failure to obey a court order. Therefore, the trial court's issuance of the bench warrant within 21 days after the show cause hearing did not violate MCR 2.614.

Defendant also claims that she was wrongfully imprisoned for five days and again cites MCR 2.614(A)(1). However, there is nothing in this rule that pertains to the duration of incarceration for contempt of court. Further, defendant has already served her sentence for contempt, and after the May 22, 2006, hearing, the trial court set aside the bench warrant. Even if there was a violation of MCR 2.614(A)(1), it is impossible for this Court to fashion a remedy, and the issue is moot. *Dudzinski*, *supra* at 112.

Defendant also briefly asserts that the "federal UCCJEA" provides that a protection from abuse (PFA) order in Pennsylvania superseded the trial court's orders regarding custody. However, defendant fails to describe the pertinent sections of this alleged code or indicate how it applies to this case. Again, "[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson*, *supra* at 243, quoting *Mitcham, supra* at 203. Defendant's failure to properly address the merits of her assertion constitutes abandonment of the issue. *Thompson*, *supra* at 356.

Defendant has not demonstrated plain error with regard to the notice of the show cause order, the validity of the contempt order and bench warrant, or the applicability of the "federal UCCJEA."

Defendant next argues that the trial court abused its discretion by transferring physical custody to plaintiff on April 17, 2006, sua sponte, without determining whether a change of circumstances or an established custodial environment existed and without reviewing the best interests factors. MCL 722.28 provides that child custody orders shall be affirmed on appeal unless the trial court made "findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." See also *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). A finding of fact is against the great weight of the evidence if the evidence "'clearly preponderates in the opposite direction.'" *Id.* at 879, quoting *Murchie v Std Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). This Court reviews the trial court's discretionary rulings, including custody decisions, for an abuse of discretion. *Fletcher*, *supra* at 879-881. This Court reviews questions of law for clear legal error, which occurs when a court incorrectly chooses, interprets, or applies the law. *Id.* at 881.

Initially, we note that defendant relies on MCL 552.17 to support an assertion that a trial court may not sua sponte change custody without a motion from one of the parties. However, MCL 552.17(1) provides that a trial court may alter a judgment concerning custody "as the

circumstances of the parents and the benefit of the children require." Therefore, defendant's argument is misplaced.

We find, however, that the trial court did err in certain respects. MCL 722.27(1)(c) provides that a trial court may conduct a child custody hearing to modify or amend a previous order or judgment only on a showing of a proper cause or change in circumstances. See also *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005), and *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The last order affecting custody before April 17, 2006, was the judgment of divorce, entered on April 4, 2006, and the trial court failed to determine whether proper cause or a change of circumstances had occurred before it changed custody on April 17, 2006.[3]

To determine the movant's burden of proof in a child custody proceeding, a trial court must make a factual determination about whether an established custodial environment exists. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). A trial court must make a specific finding regarding the existence of an established custodial environment. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). The trial court failed to determine whether an established custodial environment existed before it changed custody on April 17, 2006.

MCL 722.27(1)(c) provides that a trial court is required to conduct a hearing regarding the child's best interests before changing custody, even on a temporary basis. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). A trial court cannot make a proper determination or the necessary findings of fact without considering admissible evidence. *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991). Further, a change of custody is not an appropriate punishment for contempt. *Bylinski v Bylinski*, 25 Mich App 227, 229; 181 NW2d 283 (1970). Therefore, the trial court committed clear legal error in changing custody on April 17, 2006, without first conducting a hearing on the best interests of the child.

However, the court's errors do not require reversal because the trial court eventually conducted a hearing on the best interests of the child on October 24, 2006. *Mann*, *supra* at 533. To the extent that defendant argues that reversal is required because the trial court failed to determine on April 17, 2006, whether a change in circumstances and an established custodial environment existed, it is impossible for this Court to fashion a remedy because the trial court made determinations regarding both issues during the best interests hearing on October 24, 2006. Therefore, these issues are moot. *Dudzinski*, *supra* at 112.

Additionally, defendant is incorrect in maintaining that the trial court found an established custodial environment with plaintiff leading up to the October 24 hearing. Rather, the court found that an established custodial environment had existed with defendant but that a change of circumstances had occurred between April 4 and April 17, 2006 – namely, defendant's violation of the parenting time order. The court correctly held that plaintiff had the burden of

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[3] The trial court stated that it was changing custody because defendant had disobeyed court orders and it was the only way to get relief for plaintiff.

proof on October 24, 2006, to show by clear and convincing evidence that a change of custody was warranted.

Defendant next asserts that the trial court made false representations to the Pennsylvania trial court that resulted in the dismissal of a PFA order and permitted execution of the bench warrant. However, defendant cites no legal authority or support from the lower court record to support this assertion. Again, "[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson*, *supra* at 243, quoting *Mitcham*, *supra* at 203. Defendant's failure to properly address the merits of this assertion constitutes abandonment of the issue. *Thompson*, *supra* at 356.

Defendant raises two issues regarding the October 24, 2006, hearing and change of custody. These issues concern the timing of the hearing and three of the best interests factors. However, these issues are not properly before this Court because they were not included in the "statement of questions involved" section of plaintiff's brief on appeal, as required by MCR 7.212(C)(5). Therefore, they may be deemed waived and not subject to appellate review. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Nevertheless, we exercise our discretion and review them. See, generally, *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003).

Defendant first asserts that the trial court erred in failing to conduct the evidentiary hearing within 56 days after she requested it. MCR 3.210(C)(1) provides that, when the custody of a minor is contested, a trial court must conduct a hearing within 56 days after the court orders the hearing or after the filing of notice that a custody hearing is requested. However, MCR 3.210(C)(7) provides that a trial court may extend the time required to conduct a hearing for good cause. The trial court granted defendant's request for a hearing on May 22, 2006, and scheduled a hearing for June 22, 2006, but the parties agreed to adjourn it. The hearing was rescheduled for July 20, 2006, but the parties agreed to adjourn it until August 25, 2006, and then the parties agreed to adjourn the hearing until September 19, 2006. The hearing was rescheduled for October 11, 2006, but the parties adjourned it until October 24, 2006, when the hearing was ultimately conducted. The parties' various consent agreements to adjourn the hearings constituted good cause, and a party may not stipulate to a matter and then argue on appeal that it was error. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 529; 695 NW2d 508 (2004). Therefore, defendant's argument is meritless.

Defendant challenges the trial court's factual findings regarding three of the statutory best interests factors, MCL 722.23(e), (k) and (l). A trial court must make specific findings of fact regarding each of the 12 factors. *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). The trial court is not required to weigh the statutory best interests factors equally. *Id*. at 131. The welfare of the child is always the "overwhelmingly predominant factor." *Heid v Aaasulewski*, 209 Mich App 587, 595; 532 NW2d 205 (1995).

MCL 722.23(e) focuses on the "permanence, as a family unit, of the existing or proposed custodial home or homes." Factor (e) concerns the permanence of the custodial home, as opposed to its acceptability. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996); *Fletcher*, *supra* at 884-885. Defendant contends that the trial court failed to consider the

importance of the familial unit, in particular the relationship between the child and her older child from another relationship, Kimanzi. Defendant compares the October 24, 2006, findings to the March 3, 2006, findings, wherein the trial court considered the child's relationship with Kimanzi under factor (l). The evidence showed that defendant lived with Kimanzi and defendant's mother, Dorcas Hall, in Hall's house in Pennsylvania and that plaintiff lived in his own house in Michigan. The trial court found the parties equal on this factor because both homes were permanent. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's finding on this factor, and this finding was not against the great weight of the evidence.

MCL 722.23(k) instructs the trial court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." Defendant claimed that her reason for leaving plaintiff in April 2005 was that he had pushed her, called her names, and broken the windshield of her vehicle in front of the child and Kimanzi. A family counseling clinic report was prepared and admitted at the hearing. This report showed that both parties portrayed themselves as victims and that they aggressively fought regardless of the child. The trial court found that there was no domestic violence regarding factor (k), although it acknowledged that there were some indications of pushing "years and years ago[.]" Defendant claims that this finding was contrary to the trial court's finding on March 3, 2006, following an evidentiary hearing, wherein the trial court found that plaintiff forced and manipulated defendant. However, defendant mischaracterizes this finding, which was part of the trial court's findings regarding defendant's request for a change of domicile. The trial court found that plaintiff had a motivation to force and manipulate defendant to return to Michigan. The trial court did not make a finding that plaintiff had committed domestic violence; rather, when evaluating factor (k) on March 3, 2006, the trial court found that there was no domestic violence. Therefore, the evidence did not clearly preponderate in the opposite direction of the trial court's finding on this factor, and this finding was not against the great weight of the evidence. We note that trial courts, which are "more experienced and better situated to weigh evidence and assess credibility," are in a superior position to make accurate decisions about which custody arrangement will be in the child's best interests. *Fletcher*, *supra* at 889-890.

Defendant claims that the trial court improperly considered her repeated denial of parenting time. However, MCL 722.23(l) requires the trial court to consider any other factor it deems relevant to the custody dispute. On March 3, 2006, the trial court found, as a matter of fact, that defendant's allegations of sexual abuse of the child by plaintiff were false. A report from the department of human services was admitted as an exhibit at the hearing. In this report, the investigator questioned the credibility of the accusations and concluded that there was no evidence to support the allegations of abuse. Between the time the judgment of divorce was entered and the hearing, defendant violated a parenting time order and was held in contempt. This was the second time the trial court held defendant in contempt and issued a bench warrant for failure to obey a parenting time order. The trial court considered defendant's repeated false allegations against plaintiff, her interference with the relationship between plaintiff and the child, and her repeated denial of parenting time and concluded that factor (l) favored plaintiff. The evidence did not clearly preponderate in the opposite direction of the trial court's finding on this

factor, and the court's finding was not against the great weight of the evidence.[4] Because none of the challenged findings regarding the best interests factors were against the great weight of the evidence, the trial court did not abuse its discretion in awarding plaintiff physical custody.

Defendant next challenges the trial court judge's impartiality. This Court reviews the decision of the chief judge or assigned judge regarding a motion for disqualification for an abuse of discretion. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997).

At the outset, we note that defendant's argument regarding this issue is not entirely coherent. However, we will address this issue as if it were properly argued as an appeal from the September 14, 2006, order denying defendant's motion for disqualification of the trial court judge.

MCR 2.003(B)(1) provides that a judge is disqualified when he cannot impartially hear a case, including but not limited to instances in which the judge "is personally biased or prejudiced for or against a party or attorney." One who seeks to disqualify a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). MCR 2.003(B)(1) requires a showing of actual and personal bias or prejudice. *Cain, supra* at 495. The bias or prejudice requirement means that disqualification is not warranted unless the bias is both personal and extrajudicial, i.e., has its origin in "events or sources of information gleaned outside the judicial proceeding." *Id.* An unfavorable opinion that derives from the facts or events of the current proceeding will not constitute a basis for disqualification unless it displays "'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Id*. at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

In moving for disqualification of the trial judge, defendant relied on the April 17, 2006, order transferring custody to plaintiff, finding defendant in contempt, and issuing a bench warrant for defendant's arrest. However, repeated rulings against a party, no matter how erroneous or how vehemently expressed, are not a basis for disqualification. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995); see also *Liteky, supra* at 555. Rather, defendant must demonstrate that the judge would be unable to rule fairly given his past comments or expressed views. Although the trial judge changed custody without an evidentiary hearing and in reaction to defendant's failure to obey the trial court's order, nothing in the record supports a finding that the trial judge harbored a deep-seated favoritism or antagonism or could not put his previous rulings out of his mind. Moreover, the trial judge did not make any comments on the record indicating any expressed bias or any extrajudicial prejudice. Therefore, defendant has not met the MCR 2.003(B)(1) standard required to disqualify a judge.

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[4] To the extent that defendant raises parental alienation syndrome in her argument regarding factor (l), this is an improper attempt to expand the record on appeal and will not be considered. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Indeed, defendant attaches numerous exhibits to her appellate brief that are not contained in the lower court record; we do not consider these exhibits.

Defendant also asserts that reassignment to another judge is warranted on remand. Given our resolution of defendant's other issues on appeal, a remand is not necessary, and we need not consider this issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens